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In The
Supreme Court of the United States

CITY OF SACRAMENTO and MIKE KASHIWAGI,
Director of the Department of Public Works of the
City of Sacramento, in his Official Capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INDIVIDUAL COUNTIES *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS CITY OF SACRAMENTO, ET AL.

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INTEREST OF THE *AMICI CURIAE*[*]

The National Association of Counties (NACo) was created in 1935, when county officials desired a strong voice in the nation's capital. More than six decades later, NACo continues to ensure that the nation's 3,066 counties are heard and understood in the White House and the halls of Congress. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population. NACo has determined that this case is a significant matter affecting counties nationwide.

The California State Association of Counties (CSAC) is a non-profit corporation. Its membership consists of all 58 California Counties in the state. CSAC sponsors a Litigation Coordination program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties within California. The following California counties, individually, have also determined that this case is a matter of extreme importance and have thus joined in the submission of this brief: Butte, Colusa, Contra Costa, Glenn, Humboldt, Kings, Lake, Marin, Merced, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Santa Cruz, Shasta, Sierra, Siskiyou, Tuolumne and Ventura.

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[*] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Davidson County, Tennessee, and the County of Denver, Colorado, also support this brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision significantly undermines Title II's[1] statutory and regulatory framework – a framework that heretofore has carefully balanced the competing policy concerns animating program accessibility jurisprudence: (1) achievement of optimum accessibility for services, programs, and activities administered by state and local governments; and (2) effective management of finite state and local government resources. Certain features of Title II's Program Accessibility regulations are direct responses to these policy concerns. The two-tiered access requirement structure, undue burden defense, and transition plan are critical components of the Justice Department's Program Accessibility regulations. These regulations reflect Congress's recognition that it would be economically catastrophic to require immediate, simultaneous retrofitting of the nation's public infrastructure in order to provide universal access to persons with disabilities, and that the most practical and fiscally responsible approach to achieving the policy aims of the ADA is through gradual, incremental implementation.

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[1] Title II of the Americans with Disabilities Act ("ADA") is an extension of the Rehabilitation Act of 1973, which prohibits discrimination against individuals with disabilities in federally assisted programs. Title II applies to public entities, excluding most non-federal government entities. Title II defines "public entities" as "any State or local government; and . . . the National Railroad Passenger Corporation, and any commuter authority (as defined in § 103(8) of the Rail Passenger Service Act, 45 U.S.C. § 502(8))." ADA § 201(1), 42 U.S.C. § 12131(1).

The Ninth Circuit's opinion, however, eviscerates this framework in holding that the ADA and the Rehabilitation Act cover "anything a public entity does" so long as it is a "normal function of a governmental entity." Now, according to the Ninth Circuit's opinion, every part of a municipality's infrastructure is potentially a "program, service, or activity" that must be made immediately compliant with the ADA – a pronouncement directly at odds with the ADA's program accessibility framework. The deleterious effect of the Ninth Circuit's opinion is also compounded by the opinion's analytical shortcomings. Not only does the Ninth Circuit's opinion fail to analyze the critical issue of whether existing sidewalks are a program, service, or activity under Title II of the ADA, but it also disregards the enormous financial burden to be placed on local governments throughout the Ninth Circuit by requiring immediate retrofitting of entire public infrastructure systems. The Ninth Circuit's decision also raises significant implementation issues that impact greatly on the budgets of local governments. Congress did not intend for such results. Therefore, this Court should grant the petition for a writ of certiorari to: (1) restore order to Title II's budget-sensitive Program Accessibility framework; (2) establish a workable, analytical guide for judicial treatment of coverage questions under Title II; (3) address the implementation issues raised by the Ninth Circuit's opinion; and (4) declare that the policy aims of the ADA, with regard to existing facilities, are best achieved through gradual, incremental implementation.

ARGUMENT

A. The Statutory and Regulatory Framework of the ADA and the Rehabilitation Act

Congress passed the ADA in 1992 to address discrimination against persons with disabilities. The ADA

addresses discrimination in employment (Title I), in public services and public transportation (Title II), and in public accommodations (Title III). 42 U.S.C. §§ 12111-12189; *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Congress did not set forth the specific obligations of public entities in this section, but rather directed the Justice Department to issue regulations to implement the provisions of Title II. 42 U.S.C. § 12134(a). Among other things, Congress directed that the regulations be consistent with the provisions of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled persons by any program receiving federal financial assistance. 42 U.S.C. § 12134(b). With regard to program accessibility in existing facilities, Congress directed that the regulations be consistent with Section 504 regulations for federally-conducted activities. *See* 28 C.F.R. pt. 39.

In accordance with Congressional mandate, the Department of Justice promulgated "program accessibility" regulations that require that no disabled person shall be denied the benefits of or participation in any program, service, or activity "because a public entity's facilities are inaccessible to or unusable by persons with disabilities." *Id.* at § 35.149. The Department of Justice defined the term "facility" to include any place where a program, service, or activity is offered. *Id.* at § 35.104. The Program Accessibility regulations also maintained the two-tiered

approach to facility accessibility established in Rehabilitation Act regulations. This two-tiered system distinguishes between a public entity's duties with respect to "existing facilities" (*id.* at § 35.150) as opposed to "new construction or alterations." *Id.* at § 35.151.

With regard to existing facilities, the regulations do *not* require public entities to immediately retrofit all existing facilities to provide access to persons with disabilities. Instead, the regulations require only that public entities operate all programs, services and activities in such a way that when viewed in its entirety, each service or program is "readily accessible to and usable by individuals with disabilities. . . . " *Id.* at § 35.150(a). Additionally, the regulations provide that a public entity need not take any action if it can demonstrate that doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* at § 35.150(a)(3). The regulations also set forth a transition plan, whereby certain public entities, within six months of January 26, 1992, must: (1) identify the physical obstacles that limit the accessibility of its programs or activities with disabilities; (2) describe its rectification methods; and (3) specify a schedule for achieving compliance. *See id.* at § 35.150(d). By contrast, the regulations governing "new construction or alterations" are more stringent; neither the undue burden defense nor the transition plan is available under the new construction regulations. *Id.*

B. The Proceedings Below

This case was filed by several mobility and vision impaired individuals, on behalf of themselves and others

similarly situated against the City of Sacramento (City). Respondents here alleged that the City violated the terms of the ADA and Rehabilitation Act by failing to install curb cuts in newly constructed sidewalks and by failing to ensure program access to public rights-of-way.

The parties filed motions for summary judgment and summary adjudication on the question of whether sidewalks themselves are covered by the program access requirements of the ADA and Rehabilitation Act. The district court denied Respondents' summary judgment motion and granted in part the City's partial motion for summary judgment. In its order, the district court found that sidewalks were not a program, service, or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act. The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

On appeal, the Ninth Circuit reversed the district court, holding that it was unnecessary to split hairs to determine whether particular functions, such as sidewalks, are a program, service or activity under the ADA. *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002). Instead, the Ninth Circuit held that Title II covers "anything a public entity does" and that the critical inquiry was "not so much * * * whether a particular public function can *technically* be characterized as a service, program or activity, but whether it is a "'normal function of a governmental entity.'" *Id.* at 1076 (quoting *Bay Area Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999).

The panel then held that "maintaining public sidewalks is a normal function of a city and "without a doubt

something that the [city] 'does.'" *Barden*, 292 F.3d at 736 (quoting *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1173 (9th Cir. 2002), *cert. granted*, 72 U.S.L.W. 3247 (Nov. 18, 2002) (No. 02-479)). Thus, the panel reasoned, "[m]aintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II." *Barden*, 292 F.3d at 1076.

C. The Ninth Circuit's Opinion Eviscerates the Program Accessibility Framework

As mentioned above, when Congress passed the ADA it directed the Attorney General to issue regulations implementing the policy goals of the ADA within one year after its enactment. H. Rep. No. 485, 101st Cong., 2d Sess., pt.3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 475. Congress directed the Attorney General to issue regulations consistent with the Rehabilitation Act of 1973, "except with respect to 'program accessibility, existing facilities' and 'communications,'" *Id.* For those excepted provisions, Congress specifically directed the Attorney General to issue regulations consistent with the regulations applicable to federally conducted activities under Section 504 of the Rehabilitation Act. *Id.*

Following Congressional direction, the Department of Justice promulgated the Program Accessibility regulations found at 28 C.F.R. §§ 35.149 *et seq.* These regulations mirrored the two-tiered accessibility provisions of the Rehabilitation Act, imposing certain requirements for "existing facilities" (*id.* at § 35.150) and different requirements for "new construction and alterations" of facilities (*id.* at § 35.151). In its Section-By-Section Analysis of the Program Accessibility, Existing Facilities regulations, the

Department of Justice explained the practical reason for the distinction:

> Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 C.F.R. part 39). The concept of "program accessibility" was first used in the section 504 regulations adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. *Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.*

28 C.F.R. Part 35, App. A, at 534 (emphasis added).

Further on in its analysis, the Department of Justice explained that "Section 35.150 requires that each service, program or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. *The regulation makes clear, however, that a public entity is not required to make*

each of its existing facilities accessible (§ 35.150(a)(1))." *Id.* (emphasis added).[2]

As the legislative and regulatory history demonstrates, Congress and the Department of Justice were cognizant of the tremendous financial burden that would be placed upon municipalities if extensive retrofitting were required under the regulations. Thus, the Department of Justice in issuing the regulations, maintained the two-tiered system used in the Rehabilitation Act as part of a deliberate effort to avoid imposing harsh financial burdens on state and local governments. In fact, this "prohibitive cost avoidance" principle animates all of the Program Accessibility, Existing Facilities regulations.

For example, the undue burden defense, which provides that public entities need not take any action that they can demonstrate would result "in undue financial or administrative burdens," is only available for existing facilities. The availability of this defense is part of Congress's recognition that extensive retrofitting of existing facilities is much too onerous a burden for local municipalities.[3] The transition plan too, is also part of an overall

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[2] "With limited exceptions, the regulations do not require public entities to retrofit existing facilities immediately and completely. Rather, a flexible concept of accessibility is employed, and entities are generally excused from making fundamental alterations to existing programs and bearing undue financial burdens." *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993).

[3] "[T]here are logical reasons for the distinction between existing and new or altered facilities. Allowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility." *Kinney v. Yerusalim*, 9 F.3d 1067, 1074 (3d Cir. 1993).

"prohibitive cost avoidance" theory found throughout the Program Accessibility regulations and the ADA itself. *See id.* at § 35.150(d).

The Ninth Circuit's opinion completely undermines the Program Accessibility framework. In its opinion, the Ninth Circuit simply stated that "[a]ttempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless 'hair-splitting arguments.'" *Barden*, 292 F.3d at 1076 (quoting *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997)). "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, we have construed 'the ADA's broad language [as] bring[ing] within its scope anything a public entity does." The panel continued, "The focus of the inquiry * * * is whether [a particular function] is a 'normal function of a government entity.'" *Barden*, 292 F.3d at 1076 (quoting *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)).

By creating and applying its overly-broad "normal function" test, the Ninth Circuit destroyed three significant aspects of program accessibility jurisprudence. First, the Ninth Circuit's decision destroyed the Congressionally-mandated division between existing and new facilities. Now, under the Ninth Circuit's reasoning, any piece of property maintained by a public entity is a program, service, or activity under the ADA and must be made immediately accessible to persons with disabilities. This means that existing facilities are to be held to the same stringent requirements placed on newly constructed or altered facilities, without difference. Such a result clearly flies in the face of expressed Congressional intent and the

regulations promulgated consistent with that intent, as discussed above. If Congress desired a "normal function" test to obliterate the line between existing and new facilities, why did it specifically direct the Department of Justice to impose regulations maintaining the two-tiered system in the first instance? *See* H. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 475.

Second, the Ninth Circuit's opinion destroyed the deliberate timing features of the Program Accessibility regulations. As mentioned above, the Program Accessibility regulations provide that certain municipalities[4] must, within six months of January 26, 1992, develop a transition plan to: (1) identify the physical obstacles that limit the accessibility of its programs or activities with disabilities; (2) describe its rectification methods; and (3) specify a schedule for achieving compliance. *See id.* at § 35.150(d).

By providing for the creation of a transition plan, the Department of Justice left the "*how to*" in the hands of the local governments. The Department of Justice explicitly recognized that the local governments, cities and counties are in the best position to determine when and how changes can be made to existing facilities to provide universal access to persons with disabilities. Since the ADA's passage, countless local governments have assuredly spent thousands of hours agonizing over budgets, project plans, and construction bids in an effort to fulfill the goals of the ADA. However, in one fell swoop, the

[4] Only public entities employing 50 or more persons are required to develop transition plans. *See* 28 C.F.R. § 35.151(d)(1).

Ninth Circuit has eliminated all existing transition plans. Under the "normal function" test, the Ninth Circuit's opinion effectively and immediately nullified the transition plan for every county and municipality within its jurisdiction. Because local governments must make their programs, services, and activities immediately accessible, and because every facility maintained by a public entity is now conceivably a program, service, or activity, state and local governments within the Ninth Circuit are now prohibited from implementing gradual changes to existing facilities as Congress intended, even if the facility is otherwise not essential to providing access to a "legitimate" program, service or activity.

Finally, the Ninth Circuit's opinion does away with the budget-sensitive provisions of the Program Accessibility regulations, subjecting local municipalities to incalculable economic burdens. By holding that the ADA covers "anything a public entity does" so long as it is a "normal government function," the Ninth Circuit's opinion requires public entities to immediately retrofit existing facilities to make them ADA-compliant. Because the opinion erased the line between existing and new facilities and eliminated the transition plan, public entities must now scramble to make all of their existing facilities immediately ADA-compliant. Aside from the fact that Congress never intended this result, the Ninth Circuit's opinion would have an extraordinarily costly effect, a fact the Ninth Circuit's opinion blithely ignores.

As noted in Petitioners' brief, one estimate of the cost of sidewalk construction is $36,000 per mile. See www.commuterservices.com/costs.htm. There are also 450,000 miles of

roads within the Ninth Circuit. See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. Assuming that the number of sidewalk miles is close to the number of road miles, the potential estimated cost of a circuit-wide sidewalk retrofit could easily exceed $16,200,000,000. While these figures are necessarily guesswork, the point is otherwise clear – requiring local governments to immediately retrofit hundreds of existing sidewalks is an extremely costly proposition. This does not even take into account the costs associated with immediate retrofitting of other existing pieces of municipal infrastructure. Under the Ninth Circuit's opinion, local municipalities may now be required to make their roads, bridges and streets immediately ADA-compliant and at great costs.

The Ninth Circuit's opinion did much to dismantle a carefully constructed accessibility program – a program crafted in accordance with Congressional intent and implemented through Justice Department regulations. The statutes and regulations comprising the accessibility program were drafted with an understanding of the limited resources of municipal governments and an intent not to subject these local public agencies to undue financial burden. These provisions, and their underlying intent, are nullified under the Ninth Circuit's "normal function" test. This Court should grant the petition for a writ of certiorari to restore order to Title II's budget-sensitive Program Accessibility framework.

D. The Ninth Circuit's Decision Is Analytically Flawed

The Ninth Circuit's opinion contains analytical missteps that are detrimental to consistent application of the

ADA's statutes and regulations. This Court should also establish a workable, analytical guide for judicial treatment of coverage questions under Title II.

In *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), this Court was asked to decide whether a motivational boot camp, part of the Pennsylvania state prison system, was a program, service, or activity under the ADA. In holding that the motivational boot camp was a program under the ADA, this Court carefully analyzed whether the challenged function was covered under the plain terms of the regulations. *Id.* at 212. *Yeskey* established that whenever a challenge has been made regarding whether a particular public function is a program, service or activity under the ADA, barring an ambiguous provision, the district court must perform a term-by-term analysis to determine if the challenged function is actually a program, service, or activity. *Id.*

The Ninth Circuit refused to follow *Yeskey*. The panel refused to analyze whether a sidewalk is actually a "program, service or activity" under the ADA. Instead, the Ninth Circuit held that Title II applies to "anything a public entity does," so long as it is a "normal function of a governmental entity." *Barden*, 292 F.3d at 1076. The Ninth Circuit's approach to this coverage question is distinctly different from this Court's directive in *Yeskey*. Where this Court has focused its inquiry in these types of cases narrowly and deliberately, by comparing the challenged function with the operative statutory language, the Ninth Circuit cast its net wide, holding that Title II covers "anything a public entity does" or has.

If this Court agrees that the Ninth Circuit incorrectly analyzed the coverage question herein appealed, the

opinion provides this Court with a great opportunity to establish the analytical approach that should have been taken and what should be followed by the district courts in the future when faced with a program coverage challenge under Title II. The Ninth Circuit's opinion also offers this Court a significant opportunity to expound upon the meaning and scope of *Yeskey*.

If this Court determines that the Ninth Circuit was correct in its analysis, this case still provides the Court with an excellent opportunity to more fully explain how the "normal function" test applies in program coverage questions under Title II. For example, the question before the district court below was whether sidewalks are programs, services, or activities under Title II. The same question was before the Ninth Circuit panel. The Ninth Circuit, glossing over the fact that a sidewalk cannot be something that someone does, held that "maintenance" of a sidewalk *is* something that a "public entity does" and therefore sidewalks are covered under Title II. By placing the word "maintaining" in front of any municipally-owned item, anything can become a program, service or activity under the ADA. Certainly, such a possibility is not what Congress intended. The Court's guidance is definitely needed to alleviate the confusion created by the Ninth Circuit opinion and its "normal function" test.

E. Implementation Issues

The Ninth Circuit's opinion raises several implementation issues. Set forth below are examples of how the Ninth Circuit's opinion creates or fails to address several, practical implementation issues.

1. Cost Allocation

The impediments to accessibility are oftentimes controlled by entities other than the local government (i.e., transit authorities, electrical companies, newspaper corporations, etc.). The panel's decision does not provide any guidance regarding how local governments should logistically coordinate with the various other entities contributing to the obstacle complained of. For example, how are local governments to allocate costs between themselves and the contributing entity? The Ninth Circuit's opinion creates real logistical concerns.

2. The Scope and Reach of the Normal Function Test

As discussed above, the panel's holding means that every piece of a local government's infrastructure is a program, service or activity under the ADA. The Ninth Circuit's decision does not address the outer boundary of its test. For example, can the panel's opinion be read to require that local governments must now build new infrastructure where none existed previously? There are numerous dirt, gravel and otherwise unpaved roads within the Ninth Circuit. To the extent that these roads are inaccessible to persons with disabilities, does the Ninth Circuit's holding require that the local governments build new roads and accompanying sidewalks, despite the fact that the local government had not expended any funds at or near the questioned area and the road and sidewalks are not needed for access to any covered program?

3. Transition

As previously addressed, the Ninth Circuit's opinion undermines the timing and transition features intended by Congress and regulated by the Justice Department. Local governments within the Ninth Circuit now must make existing sidewalks immediately compliant. However, the panel's decision does not offer any guidance on how local government should order their priorities. For example, how are local governments to determine which sidewalks (or other pieces of infrastructure) must be addressed first? Additionally, must local governments self-assess, or will assessment be performed by an outside party? Finally, if immediate, universal access is required, is a local government in constant violation of the ADA until all adjustments are made?

This Court should make a formal pronouncement regarding the preferred method of retrofitting existing infrastructure. Certainly, the Ninth Circuit's approach to retrofits of existing infrastructure is completely unworkable. Every municipality within the Ninth Circuit is now placed under considerable financial burdens to immediately retrofit all of their existing sidewalks (or other facilities). This case represents an opportunity for this Court to give judicial voice to Congress's intent as regards program accessibility and existing facilities. With this opportunity, the Court could, once and for all, declare that gradual implementation of ADA's policy aims is the best approach to realizing: (1) achievement of optimum accessibility for services, programs, and activities administered by state and local governments; and (2) effective management of finite state and local government resources.

CONCLUSION

The Ninth Circuit's opinion has destroyed the carefully drafted framework of the Americans with Disabilities Act. The Ninth Circuit's opinion also has subjected municipalities throughout its jurisdiction to potentially staggering financial burdens. This Court's guidance is needed to restore order to Title II's budget-sensitive Program Accessibility framework, to establish a workable, analytical guide for judicial treatment of coverage questions under Title II; and to declare that the policy aims of the ADA, as regards existing facilities, are best achieved through gradual, incremental implementation. Accordingly, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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